Supreme Court, U.S.
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No. 86-597

IN THE SUPREME COURT
OF THE UNITED STATES

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OCTOBER TERM, 1986

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UNION GAS COMPANY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

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# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals properly concluded that inclusion of States among those amenable to suit under a federal statute does not itself amount to the clear expression of Congressional intent required to abrogate Eleventh Amendment immunity, particularly where the statute is enforceable against States by the United States.

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## STATEMENT

This case began as an action by the United States against Union Gas Company to recover the costs of cleaning up coal tar which had seeped into a creek in Pennsylvania. Pet. App. A-3. Union Gas, in response to the United States' amended complaint, filed a third-party complaint against the Commonwealth of Pennsylvania, alleging that Pennsylvania was responsible for the seepage. Pet. App. A-4. The District Court concluded that the third-party claim was barred by the Eleventh Amendment because the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. (1982), did not clearly abrogate of the States' immunity

from suit in federal court. Pet. App. A-37-A-45. Following a settlement between the United States and Union Gas, Union Gas appealed the dismissal of its third-party claim.

The Court of Appeals, examining this Court's Eleventh Amendment precedents, concluded that abrogation of the States' immunity must be reflected either in clear statutory language or other overwhelming evidence of Congressional intent. Pet. App. A-7-A-11. The Court found in CERCLA neither prerequisite for abrogation: the statutory language did not suggest abrogation and the legislative history was silent on the subject. Pet. App. A-13-A-14. In reaching its conclusions, the Court of Appeals noted the strong resemblance between CERCLA and the statute examined in Employees of Department of Public

Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1972). Much like the statute at issue in Employees, CERCLA lacks any clear expression of an intention to eliminate States' immunity and the statute continues to have meaningful applications in spite of the existence of immunity. For these reasons, the Court of Appeals affirmed.

## ARGUMENT

1. a. Petitioner claims (Pet. 6), as it did below, that CERCLA is clear in providing for liability on the part of States to private parties. Arguing from this premise, petitioner then characterizes the decision below as requiring that Congress' intent to abrogate Eleventh Amendment immunity be manifested "by some further statement or . . . some additional legislative history." Pet. 6. This is a mischaracterization of the decision of the Court of Appeals.

In fact, the Third Circuit, adhering to the tests prescribed in Atascadero State Hospital v. Scanlon, No. 84-351 (June 28, 1985) and Hutto v. Finney, 437 U.S. 678 (1978), merely applied the rule that abrogation will be

found only if either the statute itself or its legislative history unmistakably reflect a Congressional intent to eliminate the States' immunity. The Court of Appeals simply concluded that the statute did not itself explicitly abrogate immunity and the legislative history was silent on the matter.[1]

In rejecting petitioner's arguments, the Court of Appeals was influenced by the strong similarities between CERCLA and the language of the Fair Labor Standards Act which was reviewed in Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411

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[1]Because petitioner has merely repeated (Pet. 5-6) the statutory construction argument which it presented below, we rely on the discussion of the Court of Appeals (Pet. App. A-13-A-16) which properly disposes of the argument.

U.S. 279 (1972), and found by the Court not to abrogate immunity. Both statutes included States within their terms and yet neither expressly mentioned an intent to override Eleventh Amendment immunity in suits brought by private parties. As the Court of Appeals observed, in both cases the inclusion of States within the respective regulatory schemes was not rendered meaningless by a finding that immunity continued to exist since, in both cases, the United States had substantial regulatory authority which it could assert against the States. Pet. App. A-13-A-16; Employees, 411 U.S. at 285-286. This case is squarely within the rationale of Employees.[2]

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[2]Petitioner's weak attempt to distinguish Employees (Pet. 8) is unavailing. The decision in Employees did not

(FOOTNOTE CONTINUED ON NEXT PAGE)

The requirement that there be an unmistakable indication of Congressional intent to support abrogation of Eleventh Amendment protection reflects the importance of the States' immunity and the Court's unwillingness to relieve Congress of its obligation to consider the matter explicitly. Employees, 411 U.S. at 284-285. But at the same time, it is abundantly clear that all Congress

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(FOOTNOTE CONTINUED)

turn on the sequence of the statutory enactments, the history of State immunity, the particular role of the United States as protector of private parties or the degree of State participation in the regulatory scheme. Rather, the premise of the decision was the Court's unwillingness "to infer that Congress in legislating pursuant to the Commerce Clause. . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." Employees, 411 U.S. at 285. This principle controls here as well.

need do is plainly express its intent to override the immunity. Congress has done so recently in other statutes and it needs no further guidance from the Court on how to accomplish this simple task. See, e.g., Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, §1003(a)(1) (1986) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of [enumerated statutes].").

b. Petitioner's call for a reconsideration of Hans v. Louisiana, 134 U.S. 1 (1890), should be rejected. The Court has emphasized that the Eleventh Amendment is but an "exemplification" of the fundamental rule of sovereign immunity. Ex Parte State of New York No. 1, 256 U.S. 490, 497 (1921). Petitioner's contention (Pet. 9) that the

amendment grants immunity only in "suits founded on diversity jurisdiction" is contrary to the long-standing jurisprudence in this area. See Atascadero, slip op. at n.2. In fact, the Court recently has refused, in the face of a strong dissent, to reconsider the conclusion in Hans that the Eleventh Amendment applies to a suit brought by a citizen against his own State. Atascadero, slip op. at 9-10 n.3. Petitioner has presented no new reasons to support a contrary result.

2. Despite petitioner's suggestion (Pet. 7), there is no confusion over the proper standard for finding abrogation of Eleventh Amendment immunity. The case to which petitioner points, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, No. 85-1469 (April 28, 1986), does no more than apply the rules

of Atascadero and Employees. The First Circuit simply concluded in that case that the combination of the statutory language of the Education for All Handicapped Children Act and the consequence that acceptance of the immunity claim would remove from the statute's operation the only entities regulated by it mandated a finding of abrogation. Neither circumstance is present here.

3. We expect petitioner to argue in reply that a recent amendment to CERCLA now makes it clear that Congress has removed Eleventh Amendment immunity in suits brought by private parties.[3] But the amendment is a far

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[3]The amendment is as follows:

STATE OR LOCAL GOVERNMENT LIMITATION -- Paragraph (20) section 101 of CERCLA

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cry from the clear expression of Congressional intent which is required to support abrogation. The amendment has the obvious purpose of requiring that

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(FOOTNOTE CONTINUED)

(defining "owner or operator") is amended as follows:

(1) Add the following new subparagraph at the end thereof:

"(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the

(FOOTNOTE CONTINUED ON NEXT PAGE)

cleanup costs be recovered from the prior owner of a facility acquired involuntarily by a State or local government, unless the State or local government shares in the responsibility for the release. The conference committee's comments confirm that the new

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(FOOTNOTE CONTINUED)

> same manner and to the same extent, both procedurally and substantively as any nongovernmental entity, including liability under section 107.".
>
> (2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101(b), 100 Stat. 1613 (1986).

provision was aimed at insulating State and local governments from the statute's strict liability provisions where a State acquires a facility involuntarily, but that this exclusion from liability should not apply where the government in fact caused a hazardous release.[4] There is to be sure no mention of Eleventh Amendment immunity, nor any suggestion that this provision was designed to reverse in any way the decision of the Court of Appeals in this

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[4]According to petitioner's complaint, the Commonwealth relocated the subject creek at the request of the Army Corps of Engineers and eventually acquired an easement over the creek by conveyance. Court of Appeals Appendix at 106a. This not the sort of involuntary acquisition contemplated by the amendments to CERCLA.

case.[5] H.Rep. No. 99-926, P. 185-186 (1986).

As we noted earlier, Congress is well aware of the Eleventh Amendment and the settled manner for abrogating its protections. For whatever reason, Congress has not chosen to expose the States to unlimited liability under CERCLA. The Court should decline petitioner's invitation to close what only it sees as a "yawning gap" in the regulatory scheme. This is a job for Congress and that is where petitioner should direct its arguments.

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[5]The decision of the Court of Appeals was handed down on June 10, 1986 and the Superfund Amendments were not passed by Congress until October 8, 1986. Presumably, if Congress disagreed with the decision below, it would have included in the comprehensive revision of CERCLA some clear expression of its intent.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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